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In The

Supreme Court of the United States

October Term, 1990

KING ISLAND NATIVE COMMUNITY,

Petitioner,

v.

STATE OF MONTANA
DEPARTMENT OF FAMILY SERVICES,

Respondent.

Petition For Writ Of Certiorari To The Montana Supreme Court

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF *AMICUS*

Amicus Curiae, the Navajo Nation, joins the Petitioner in urging the Court to grant certiorari in this case. The parties have consented to the filing of this brief as required in this Court's Rule 37. The Navajo Nation is the largest Indian tribe, with a reservation that spans three states, and with enrolled members residing throughout the United States. Because of their numbers and the mobility of their families, children of the Navajo Nation are involved with state social service workers and state court systems on a daily basis.

The Navajo Nation has inherent authority to determine the custody of its children. The Indian Child Welfare Act both recognizes this retained power of Indian tribes and legislates the role of states in Indian child custody proceedings. This case involves a jurisdictional dispute between an Indian tribe and the courts of a state. The case presents a difficult question, not because the law in unclear, but because courts are loath to relinquish their power, particularly when a given cause strikes the court as deserving of its special attention. Courts have demonstrated great ingenuity in achieving their desired results; the "best interest" test employed by the Supreme Court of Montana to deny transfer to the King Island Native Community is an example.

The Navajo Nation urges this Court to accept certiorari to put an end to this practice which circumvents the ICWA and impairs the ability of tribes to protect their rights in their children.

REASONS FOR ISSUING THE WRIT

I. MONTANA'S USE OF A "BEST INTEREST OF THE CHILD" STANDARD TO FIND GOOD CAUSE NOT TO TRANSFER AN INDIAN CHILD CUSTODY PROCEEDING TO A TRIBAL COURT DEFEATS THE PURPOSES OF THE INDIAN CHILD WELFARE ACT

This case presents a difficult jurisdictional question. What rule will dictate the most appropriate forum when a state court and a tribal court have concurrent jurisdiction and are each empowered to hear an Indian child custody proceeding? The Indian Child Welfare Act of 1978 (ICWA) (25 U.S.C. §1901 *et seq.*) provides that when an Indian child's tribe requests a transfer of jurisdiction of a state proceeding to tribal court, the state must cede jurisdiction absent good cause to the contrary. 25 U.S.C. §1911(b).[1] This case turns on the good cause exception.

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[1] 25 U.S.C. §1911(b) deals only with jurisdiction over Indian children domiciled or residing off-reservation.

> Transfer of proceedings; declination by tribal court. In any State court proceedings for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian's tribe: Provided, That such transfer shall be subject to declination by the tribal court of such tribe.

§1911(a) provides that Indian tribes have exclusive jurisdiction over children domiciled or residing on the reservation.

The Montana Supreme Court has established a rule that in making a good cause determination under the ICWA, the courts of the state must look to the best interest of the child.[2] Pet. App. at A7. If the state court finds that the child's best interest will be harmed by transfer to the tribal court, the tribe's transfer request can be denied. The decision of the Montana Supreme Court eviscerates the ICWA by substituting a highly subjective "best interest" standard for the jurisdictional good cause determination intended by Congress.

A. The modified *forum non conveniens* doctrine of §1911(b) of the ICWA mandates transfer upon request absent good cause to the contrary

Congress in enacting the transfer provision at 1911(b) intended to created within the ICWA's jurisdictional framework a modified doctrine of *forum non conveniens*. H.R. Rep. No. 1386 at 21, 1978 U.S. Code Cong. & Ad. News 7530, 7544. The doctrine recognizes that state courts *can* exercise jurisdiction over non-reservation Indian children, but mandates that they yield to the jurisdiction of the tribe when transfer is requested.[3]

Traditional *forum non conveniens* analysis allows a court having jurisdiction to dismiss an action in favor of a

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[2] The test applied by the Montana Supreme Court was first enunciated by that court in *In the Matter of M.E.M., Youth in Need of Care*, 195 Mont. 329, 336, 635 P.2d 1313, 1317 (1981).

[3] In *Mississippi Choctaw v. Holyfield*, 490 U.S. 30 (1988) this court characterized §1911(b) as creating "concurrent but presumptively tribal jurisdiction".

more appropriate forum. F. James & G. Hazard, *Civil Procedure* 657-658 (2d ed. 1977). The "modified" doctrine codified in the ICWA does not merely permit, but demands dismissal of a state proceeding and transfer to the tribal court absent good cause not to transfer.

Long before the enactment of the ICWA, the exclusive power of tribes to regulate their internal affairs was accepted law. *U.S. v. Kagama*, 118 U.S. 375, 381 (1886). In *Fisher v. District Court*, 424 U.S. 382 (1971), this Court held that the interest of tribes in governing their affairs extended to child custody proceedings and that exercise of state court jurisdiction over the adoption of an Indian child by members of his tribe "plainly would interfere with the powers of self-government conferred upon the . . . Tribe and exercised through the Tribal Court." 424 U.S. at 387.

The ICWA must be read against this backdrop of tribal sovereignty. *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 172 (1973). The ICWA codified the existing case law regarding reservation Indian child custody proceedings in its exclusive jurisdiction provision at §1911(a). However Congress, expressing concern for the vitality of tribes and the necessity of preserving the cultural heritage of their Indian children as a means of tribal survival (25 U.S.C. §§1901-1902), went beyond developed case law and further limited the role of states in child custody proceedings concerning off-reservation Indian children.

Section 1911(b) with its modified doctrine of *forum non conveniens* recognizes that tribes should control the custody of Indian children. H.R. Rep. No. 1386 at 14-15,

1978 U.S. Code Cong. & Ad. News at 7537. It both creates concurrent jurisdiction in states and tribes and dictates the resolution of any jurisdictional disputes.

B. The "good cause" exception is limited to considerations of convenience and fairness in the exercise of jurisdiction

Analysis under the "good cause" exception to transfer provided by Congress should focus on jurisdictional prerequisites to providing an Indian child an adequate forum. Only when a fair hearing cannot be had in a tribal forum should a state court decline to transfer.

While Congress did not define "good cause" in the Act, the United States Department of the Interior, Bureau of Indian Affairs, has promulgated *Guidelines for State Courts; Indian Child Custody Proceedings* (Bureau *Guidelines*), 44 Fed. Reg. 67584, which speak to the issue of "good cause". The five criteria for denying transfer developed by the Bureau are not universally lauded by Indian tribes and their advocates, but they do list objective jurisdictional considerations. The criteria are lack of a tribal court, delay in requesting transfer, objection by a child over twelve, unavailability of evidence, and unavailability of the parents of a child over twelve coupled with no contact with the tribe. 44 Fed. Reg. 67591. The criteria address the appropriateness of the state or tribal court to hear the action.

The Bureau *Guidelines* make explicit that socio-economic conditions or the perceived inadequacy of tribal social services or judicial systems may not be considered by a state court in determining that good cause to deny

transfer exists. The decision of the Montana Supreme Court in this case relies on little else.

C. The "best interest" standard applied by Montana gives the state courts unlimited discretion and impermissibly expands the scope of inquiry beyond jurisdictional concerns

Construing the ICWA in *Mississippi Choctaw Band of Indians v. Holyfield*, 490 U.S. 30 (1989) this Court stated that "it is most improbable that Congress would have intended to leave the scope of the statute's key jurisdictional provision subject to definition by state courts as a matter of state law." 490 U.S. at ___.[4] The interpretation given the term "good cause" in §1911(b) is critical to the jurisdictional framework of the ICWA. Allowing Montana to substitute its own "best interest" standard will permit a regression in the law and return to a time when state courts "failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 15 U.S.C. §1901(5). A review of the various holdings in this case support this conclusion.

This case involves Elizabeth M., an Alaskan Eskimo, and her daughter Teresa S. The family moved from Alaska to Montana in the Summer of 1988 and had been in Montana only one month when Teresa was taking into protective custody by state social workers. Elizabeth

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[4] In *Mississippi Choctaw* the Court's inquiry was addressed to the definition given the word "domicile", contained in §1911(a), by the Mississippi Supreme Court.

returned home to Alaska shortly after the state's intervention and notified her tribe, the King Island Native Community, of Teresa's placement. The child is alleged to have been abused for most of her 3½ year life before she was removed from her mother's custody by Montana officials.

In making its "jurisdictional" decision the Montana Supreme court focuses on the "stable, loving home" Teresa has found with her Montana foster family, and contrasts it with the abuse suffered at the hands of her natural parents. Pet. App. at 11. The clear import of the court's decision not to transfer is that a life of hardship and abuse is all the Tribe has to offer Teresa.

The Court opines that if the Tribe were truly interested in Teresa's welfare it would have intervened to stop the abuse of Teresa before Montana's involvement became necessary. Pet. App. at 10. In its original decision the Court went so far as to hold that this prior lack of involvement of the tribe in protecting the child constituted good cause not to transfer. Pet. App. at 24. The trial court expresses its contempt for the Tribe more blatantly, questioning the motives of the Tribe in moving to intervene and transfer the child custody proceeding. Pet. App. at 30.

This case presents a classic example of the lack of sensitivity in state courts that the ICWA was designed to address. The Tribe has not been previously involved with Teresa because it was not informed, appropriately, of the voluntary services provided Teresa in Alaska, and, illegally, of the court proceeding instituted in Montana. Once

informed of Teresa's plight, the Tribe moved quickly to seek her return.

The opinions of the Montana trial and appellate courts demonstrate a lack of understanding of the traditional support systems available to Native people in their own communities. Elizabeth's return to King Island and the subsequent motion to transfer are viewed with suspicion by the state courts. They see a conspiracy rather than a community galvanized to aid one of its members, a response regrettably foreign in modern white communities.

The Montana Supreme Court pays lip service to the ICWA, stating that Teresa has been placed in a foster home "within reasonable proximity to the child's home in Fergus County" (Pet. App. at A10), a requirement found at 25 U.S.C. §1915(b). However the intent of the provision is to allow for continued contact by mother and child so that the rehabilitative services mandated by 25 U.S.C. §1912(d) can be attempted. Such a placement when the family had only lived in the County for one month prior to removal, and when the mother has since returned home to Alaska, is insupportable.

The Court concludes that it is not in Teresa's best interest to be removed from her Montana foster home and returned "to an isolated community with which she never had previous contact." Again, the Bureau *Guidelines* discourage state courts from taking it upon themselves to dictate a child's ties with her Native community:

> It is recommended that in most cases state court judges not be called upon to determine whether or not a child's contacts with a reservation are so limited that a case should not be transferred.

> This may be a valid consideration since the shock of changing cultures may, in some cases, be harmful to the child. This determination, however, can be made by the parent, who has a veto over transfer to tribal court.

44 Fed. Reg. at 67591. Here the mother has joined in the motion for transfer, indicating a desire that her child be returned to her tribal home. While the Court attempts to discredit this decision, reciting Elizabeth's inability to care for and protect Teresa in the past, the Supreme Court of Montana is not in a position to second-guess this mother's decision for her child.

It is possible that Montana could apply a "best interest" test consistent with the ICWA. The "best interest" standard is not unheard of in jurisdictional statutes. Both the Parental Kidnapping Prevention Act (PKPA), 28 U.S.C. §1738A and the Uniform Child Custody Jurisdiction (UCCJA), 9 U.L.A. §3, allow a state court to exercise jurisdiction if in the best interest of the child. The PKPA and UCCJA, which are virtually identical, apply a best interest standard in two situations. First, the statutes allow for a best interest determination in cases where more than one forum may assert jurisdiction, but "best interest" is defined in concrete terms, going to the appropriateness of the forum:

> (c) A child custody determination made by a court of a State is consistent with the provisions of this section only if –
>
> (1) such court has jurisdiction under the law of such State; and
>
> . . . .
>
> (B)(i) it appears that no other State would have jurisdiction under subparagraph (A),

> and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the child and at least one contestant, have a significant connection with such State other than mere physical presence in such State, and (II) there is available in such State substantial evidence concerning the child's present or future care, protection, training, and personal relationships.

28 U.S.C. §1738A(C)(2)(B). Only when no other forum could exercise jurisdiction is the best interest standard left undefined, presumably because it is in a child's best interest that some court hear his case.

The "best interest" test used in the PKPA and UCCJA directs attention to what is in the child's best interest jurisdictionally, attempting to ascertain which of the available fora will best serve the child. Montana, conversely, uses its "best interest" standard to look to the ultimate result rather than confining its inquiry to jurisdictional matters. Allowing Montana courts to apply an undefined "best interest" standard as a jurisdictional test invites reliance on local bias and prejudice to defeat tribal jurisdiction, a situation the ICWA was meant to eradicate.

II. AVAILABILITY OF EVIDENCE IN MONTANA CANNOT JUSTIFY DENIAL OF TRANSFER IN THIS CASE

The revised opinion of the Montana Supreme Court holds that not only is transfer not in Teresa's best interest, but that the criteria of the Bureau *Guidelines* offer a basis for denial as well. The provision of the Bureau *Guidelines* relied upon by the Court suggest that transfer may be

denied if "the evidence necessary to decide the case could not be adequately presented to the court without undue hardship to the parties or the witnesses." 44 Fed. Reg. at 67591. In a tautological pronouncement, the Court holds that this criteria has been met because the evidence of the events giving rise to the action is present in Montana. Montana would have no claim to jurisdiction if this were not true and common rules of construction will not permit such a result. Any state court considering the custody of a non-reservation Indian child found within its borders could make this claim, and if permitted to do so, the exception would swallow the rule.

The Supreme Court's opinion gives no consideration to the alternative methods of securing and presenting evidence suggested by the *Guidelines*, 44 Fed. Reg. 67591 Concern for the hardship to Elizabeth, now living in Alaska, if the matter proceeds in Montana, is notably lacking.

The original decision of the Montana Supreme Court held that the trial court could deny transfer using the best interest test alone. Pet. App. at A25. The earlier opinion also makes clear that the Court's best interest determination derives from doubts the Court harbored about the sincerity of the Tribe's interest or about the Tribe's ability to adequately serve Teresa. The revised opinion is but a shallow attempt to lend some legitimacy to a decision permeated with bias.

CONCLUSION

The Montana Supreme Court has allowed its view of what is best for an Indian child to justify its assertion of jurisdiction and refusal to transfer this matter to the tribal court. The ICWA does not permit this type of decision-making. For the foregoing reasons, this Court should accept certiorari.

Respectfully submitted,

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